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No. 88-567

# In the Supreme Court of the United States

OCTOBER TERM, 1988

FRANK D. MONACO, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether petitioner was entitled to an evidentiary hearing at sentencing in order to challenge alleged inaccuracies in his presentence report.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. í-22) is reported at 852 F.2d 1143.

### JURISDICTION

The judgment of the court of appeals was entered on July 26, 1988. A petition for rehearing was denied on September 22, 1988. The petition for a writ of certiorari was filed on September 30, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

On March 29, 1985, an 89-count indictment was returned against petitioner and six co-defendants in the United States District Court for the Eastern District of California. Petitioner was charged with one count of conspiracy to commit mail fraud, in violation of 18 U.S.C.

371, and 51 counts of mail fraud, in violation of 18 U.S.C. 1341. Pursuant to a plea agreement, petitioner pleaded guilty to the conspiracy charge and to one count of an information charging him with attempted income tax evasion, in violation of 26 U.S.C. 7201. He was sentenced to consecutive terms of five years' imprisonment on the two counts, and he was fined $20,000. The court of appeals affirmed (Pet. App. 1-22).

1. The factual background of this case is summarized in the government's brief in the court of appeals and in the government's sentencing memorandum. In 1974, petitioner founded Golden Plan of California, Inc., a large mortgage broker that operated throughout California. Through August 1981, petitioner was the president, chief executive officer, and sole owner of Golden Plan and of a number of related corporations. He employed a number of family members at the company and placed three of his brothers, who later became his co-defendants, in high management positions. On September 1, 1981, petitioner sold Golden Plan to one of his brothers, co-defendant Daniel Monaco. On January 28, 1982, Golden Plan closed its doors and ceased doing business. The following month, an involuntary bankruptcy petition was filed against Golden Plan.

Before becoming insolvent, Golden Plan, acting as broker, arranged for individual investors to make loans that were secured by mortgages on real property. The company contacted potential lenders by mailing prospectuses and other written materials describing available properties. Lenders typically invested in second and third deeds of trust secured by the properties described in the prospectuses.

During most of the period the company was in existence, petitioner exercised day-to-day management responsibilities over its operations. In particular, petitioner

handled the preparation of the prospectuses that were mailed to investors. To induce lenders to make loans through Golden Plan, petitioner routinely caused employees to inflate the value and to misrepresent the condition of the properties described in the prospectuses. By providing false and misleading information, petitioner was able to increase the number of Golden Plan's loan closings and the amount of its commission income.

Although most of the transactions handled by Golden Plan involved outside borrowers, petitioner and his family members also arranged insider loans to themselves and to corporations they controlled. On several occasions, petitioner and his family members purchased property and then borrowed money through loans brokered by Golden Plan. Those loans were obtained on the basis of false prospectuses that grossly overvalued the property that petitioner and his relatives had purchased. In addition, petitioner caused Golden Plan to issue false prospectuses for loans secured by properties owned by a subsidiary corporation known as Mid-Central, which acted as Golden Plan's property manager. Those properties were generally ones on which Golden Plan had foreclosed after a borrower's default, and they were often in a state of dramatic disrepair. Through Golden Plan, petitioner arranged new loans for those properties by issuing prospectuses that inflated their value and misdescribed their condition.

The monthly interest payments on many of the loans arranged by Golden Plan were paid out of Golden Plan's escrow trust account, which was supposed to hold investors' funds in trust until their loans closed. In addition, petitioner siphoned off hundreds of thousands of dollars from the account through one of his corporations, Roscoe Technology, which purportedly provided funds for loans. By September 1981, there was a shortage of almost $3 million in the company's escrow trust account.

After petitioner sold Golden Plan in September 1981, his three brothers apparently continued to issue false prospectuses for loans, and they also embezzled additional sums from the escrow trust account. By January 1982, Golden Plan was insolvent. When Golden Plan was forced into bankruptcy, investors lost more than $3 million because of the low value of the properties that secured the loans and because of the depletion of the escrow trust account.

During the period covered by the indictment, petitioner also attempted to evade the payment of income taxes and filed false income tax returns. He failed to report more than $1 million in income on his 1981 tax return, and he filed false tax returns for several of his personally controlled corporations. Based on the substantial increase in petitioner's personal wealth between 1974 and 1982, it further appeared that petitioner had consistently underreported his income for almost a decade.

2. Petitioner entered his guilty plea on July 18, 1986. Sentencing was initially scheduled for October 14, 1986, but it was subsequently delayed until January 6, 1987. Pet. App. 5-6. In mid-October 1986, the probation office delivered copies of the presentence report to petitioner and the government. Petitioner filed a number of objections to the report with the probation office. After two meetings with petitioner concerning the objections, the probation office issued a corrected presentence report in November. *Id.* at 6.

On December 2, 1986, the government filed its sentencing memorandum, which was accompanied by a book of exhibits designed to establish petitioner's individual responsibility for some of the losses that resulted from Golden Plan's operations. Pet. App. 6. Included among those exhibits was the sworn declaration of the postal inspector who determined, based on information about the

loans supplied by the bankruptcy trustee, that petitioner had a direct role in causing losses to investors of more than $1 million. Gov't C.A. E.R. 13-15. That calculation of the losses attributable to petitioner was included in the presentence report.

On December 30, 1986, one week before the scheduled sentencing, petitioner filed his objections to the presentence report, a response to the government's sentencing memorandum, and his own sentencing memorandum. At that time, petitioner asked, for the first time, for an evidentiary hearing. Among other things, petitioner requested an opportunity either to depose the bankruptcy trustee or to cross-examine him at an evidentiary hearing about the calculation of the $1 million in losses attributed to petitioner. Pet. App. 6.

At the sentencing on January 6, 1987, the district court overruled most of petitioner's objections to the presentence report. The court found that the objections, for the most part, did not challenge the accuracy of the statements of fact included in the presentence report but instead merely offered a different interpretation of those facts. Tr. 11. The court also denied petitioner's request to depose the bankruptcy trustee or to cross-examine him at an evidentiary hearing concerning the amount of the losses that petitioner caused investors to incur. The court ruled that petitioner had not shown that such an examination was necessary. Tr. 7-8, 31, 33-34.

2. The court of appeals affirmed (Pet. App. 1-22). In particular, the court rejected petitioner's claim that he was entitled to an evidentiary hearing or an opportunity to depose the bankruptcy trustee. The court noted (*id.* at 11) that the district court had found "that there was a sufficient basis for belief in the accuracy of the statements in the presentence report." That finding, the court held, satisfied the requirement of Fed. R. Crim. P. 32(c)(3)(D)

that specific findings be made regarding contested statements in a presentence report. The court of appeals then noted (Pet. App. 11) that it had "not previously resolved the question whether an evidentiary hearing is required whenever a defendant asserts that the presentence report contains inaccurate statements." The court pointed out, however, that Fed. R. Crim. P. 32(c)(3)(A) expressly provides that " '[t]he [district] court shall afford the defendant and the defendant's counsel an opportunity to comment on the [presentence] report and, in the *discretion of the court*, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it' " (Pet. App. 11-12 (emphasis in opinion)). The court of appeals accordingly held (*id.* at 13) that "a district court's decision to deny a request for an evidentiary hearing on alleged inaccuracies in a presentence report must be reviewed for abuse of discretion."

The court of appeals went on to reject petitioner's particular claims that he had been denied an adequate opportunity to rebut certain allegedly inaccurate statements in the presentence report (Pet. App. 14-18). Specifically, the court rejected the claim petitioner renews in this Court—that he was unable, without examining the bankruptcy trustee, to contest the presentence report's assertions that his criminal conduct caused losses of more than $1 million (*id.* at 14-15). The court observed (*id.* at 14) that the probation officer received the loss figure from the government, which had presented the same information in its sentencing memorandum, and that "[e]ach of the Government's statements in the sentencing memorandum was supported by a declaration and an exhibit." The court pointed out (*ibid.*) that petitioner had received that information prior to filing his own sentencing memorandum, but that he had not "take[n] advantage of the opportunity to question the bankruptcy trustee prior to filing

his motions to correct the alleged inaccuracies in the presentence report" and that he had "failed to ask the court for an order requiring the trustee to respond to his questions" when the trustee allegedly did not return his counsel's telephone calls. The court also observed (*id.* at 14-15) that petitioner "had access to all of the materials collected by the Government for trial" as a result of extensive pretrial discovery. Finally, the court noted (*id.* at 15) that petitioner, as the former owner of Golden Plan, was in a position to provide facts about the loans from the company's records if he believed the government's financial information was inaccurate. The court accordingly held (*ibid.*) that the district court did not abuse its discretion by denying an evidentiary hearing "[i]n light of the evidence presented by the Government, and [petitioner's] failure to present any facts in rebuttal."

## ARGUMENT

1. Petitioner first contends (Pet. 8-13) that he was denied due process by the district court's refusal to hold an evidentiary hearing or to allow him to depose the bankruptcy trustee concerning the losses attributed to petitioner in the presentence report. That factbound contention was correctly rejected by the court of appeals. As the district court found (Tr. 7-8, 31, 33-34), petitioner made no showing of a need for a court-ordered examination of the trustee; and as the court of appeals concluded, petitioner had an ample opportunity to make such a showing if it could be made.

The only information regarding the alleged losses that the bankruptcy trustee supplied to the government was the amounts of the various loans and the amounts of the actual recoveries on the properties securing each loan (or, in a few cases, the expected recoveries based on offers to

buy). Contrary to petitioner's suggestion (*e.g.*, Pet. 11, 13), there is no mystery about the basis for the loss calculations: the government's exhibits to its sentencing memorandum (Gov't C.A. E.R. 13-14) expressly show that the loss for each loan was simply the difference between the amount of the loan and the amount recovered. Petitioner never put forth any contrary figures or any basis whatever for doubting the accuracy of the trustee's loan and recovery figures; indeed, at least in this Court and in the court of appeals, petitioner has not even alleged that those figures were inaccurate. Moreover, the accuracy of those figures could be challenged by simple documentation. If challenged, the accuracy of the figures would raise an issue of the sort that even petitioner concedes would not necessarily require an evidentiary hearing (Pet. 10).

To the extent that petitioner, in referring to the trustee's "estimates" (Pet. 6, 13), suggests that correct appraisals of the properties were essential to calculating the true amount of the loss, that challenge affords no support for his request for a hearing to examine the trustee. There was no need for an examination of the trustee on that issue, because no such appraisals were included in the government's sentencing memorandum. Moreover, petitioner presented no evidence of his own on the issue, such as his own appraisals of the properties.[1]

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[1] Contrary to petitioner's suggestion (Pet. 12), the decision in the bankruptcy proceedings in *In re Golden Plan, Inc.*, 829 F.2d 705 (9th Cir. 1987), did not establish that the loss calculations were inaccurate. That decision involved technical issues of bankruptcy and securities law regarding, among other things, the nature of the transaction between Golden Plan and certain lenders. The decision has no bearing on the loss calcuations in the presentence report or in the government's sentencing exhibits.

Petitioner's claim that he needed to examine the trustee is even weaker with respect to the attribution of Golden Plan's losses than it is with respect to the amount of the losses. As the court of appeals pointed out (Pet. App. 14), and as the government stated at sentencing (Tr. 29), the attribution of the losses to petitioner, rather than to someone else, was made by the government, not the bankruptcy trustee. The trustee's testimony on that issue was therefore unnecessary. In any event, petitioner did not put forth evidence refuting his involvement with particular prospectuses or properties.

On both loss-related issues, therefore, petitioner failed to make even a minimal showing of need to examine the trustee in order to contest the accuracy of the information in the presentence report and in the government's sentencing memorandum and supporting exhibits. Moreover, petitioner had ample opportunity to develop the necessary information. He had full access to the government's trial preparation materials; he had been the owner and chief executive of Golden Plan at the time of the loans at issue; and he had several months to question the trustee, by his own efforts or through the aid of a court order, before he finally asked for a hearing or deposition one week prior to sentencing. In these circumstances, the district court's denial of petitioner's last-minute request to examine the trustee, when there was no basis for believing that such an examination might undermine the government's allegations of loss attributable to petitioner, did not deprive petitioner of a full and fair opportunity to challenge the sentencing information and therefore did not violate petitioner's due process rights.[2]

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[2] Nothing in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), suggests a contrary conclusion. Not even petitioner contends that a hearing must be held or compulsory process issued where, as here, there has been

2. Petitioner also contends (Pet. 14-16) that the decision of the court of appeals conflicts with *United States* v. *Romano*, 825 F.2d 725 (2d Cir. 1987). To the contrary, the Second Circuit's decision in *Romano* is fully consistent with the analysis employed by the court of appeals here. Indeed, the Second Circuit plainly stated in *Romano* that "[a] district judge, *in his discretion*, may direct that a trial-type evidentiary hearing take place" when a defendant challenges the accuracy of information in a presentence report (825 F.2d at 729 (emphasis in original)). See also *United States* v. *Pugliese*, 805 F.2d 1117, 1123 (2d Cir. 1986) ("Sentencing hearings ultimately are conducted within the discretion of the district court"). To be sure, the court in *Romano* indicated that the due process analysis of *Mathews* v. *Eldridge*, 424 U.S 319 (1976), should be applied to determine whether the district court abused its discretion in a particular case. But that analysis does not conflict with the court of appeals' analysis in the present case. See note 2, *supra*. Indeed, the court in *Romano* concluded that, when a defendant is "on notice of all relevant information that could be used in determining his sentence and ha[s] an opportunity to make appropriate objections[,] [n]o more is required by the Due Process Clause

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no showing of need, or of likely receipt of material information, let alone where there has been a fair opportunity to secure such information. *Mathews* does not require the pointless addition of procedures. Moreover, the governmental interest in avoiding needless formalization and complication of sentencing procedures is well recognized. See, *e.g.*, Fed. R. Crim. P. 32(c)(3)(A) (discretionary standard for hearing); *United States* v. *Branco*, 798 F.2d 1302, 1306 (9th Cir. 1986); *United States* v. *Satterfield*, 743 F.2d 827, 840 (11th Cir. 1984), cert. denied, 471 U.S. 1117 (1985). This case turns not on any general issue regarding sentencing procedures, but on petitioner's failure to meet the threshold showing of need for the additional requested procedure.

or by Rule 32" (825 F.2d at 730). Accordingly, in the circumstances of this case, where there was no basis for demanding an examination of the trustee and petitioner had access to the information required to challenge the presentence report, the Second Circuit would have reached the same result and would have applied essentially the same analysis as the court below.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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